

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for a mandate in the nature of a Writ of Certiorari, under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C A 12 / 2011 Writ

Samantha Kumara Madawanna
Arachchi,

No. 80 E, Mangala Mawatha,

5th Lane, Sooriyapaluwa,

Ramuthugala, Kadawatha.

PETITIONER

Vs.

1. Urban Development Authority,
6th & 7th Floors,
Sethsiripaya, Battaramulla.
2. Nihal Fernando,
Acting Director General,
Sethsiripaya, Battaramulla.

RESPONDENTS

BEFORE : SATHYA HETTGE, P.C.J. (P/C.A.) And
UPALY ABEYRATHNE, J.

COUNSEL : Upul Kumrappera for the Petitioner
S. Gnanathan ASG with D. Thilakawardena SC
for the Respondents

SUPPORTED ON : 07.06.2011

DECIDED ON : 09.06.2011

UPALY ABEYRATHNE, J.

The Petitioner is an Assistant Director (Lands) attached to the Urban Development Authority the 1st Respondent of this Application. By letter dated 16.01.2009 the Director (Human Resource Management) of the 1st Respondent's Authority had informed the Petitioner to give a statement to the inquiring officer in relation to a transaction with regard to a land leased out to M/S Jayasinghe Transport Company Limited. Upon the said direction the Petitioner made a statement to the said inquiring officer M.M.J Yalegama who was a retired police constable.

Thereafter by letter dated 07.10.2010 the 2nd Respondent had issued a charge sheet consisting of 10 charges to the Petitioner and had informed him to show cause within 14 days as to why he should not be dismissed or any punishment should not be imposed on him for anyone or more of the charges levelled against him. Thereafter by a letter addressed to the 2nd Respondent dated 01.11.2010 the Petitioner had denied all the charges levelled against him.

In this application the Petitioner seeks a mandate in the nature of writ of certiorari to quash the said appointment of the inquiring officer.

The Petitioner's complaint is that the appointment of a retired public officer as an investigating officer to conduct a preliminary investigation is contrary to the provisions of the Establishment Code. The learned counsel for the Petitioner contended that the appointment of a retired public officer to conduct a preliminary investigation is contrary section 13:1 of the Chapter XLVIII of the Establishment Code and under said section only a working officer can be appointed to conduct a

preliminary investigation. He further submitted that according to the Establishment Code “officer” means a serving public officer and not a retired public officer. Therefore the learned counsel submitted that the said preliminary investigation is *ultra vires* the section 13:1 of the Chapter XLVIII of the Establishment Code and hence the said preliminary investigation and its findings have no force in law.

The learned Additional Solicitor General strongly objected to the application of the Petitioner. Learned ASG submitted that since the appointment of the inquiring officer has been taken place as far back in 16.01.2009 the Petitioner cannot maintain this application due to his inordinate delay in coming to court.

I now consider the said submissions of both counsels. It is apparent from the letter dated 16.01.2009 (P 3) that the Petitioner had been informed to appear before the Inquiring Officer at 9.30 am on 20.01.2009. Thereafter on 20th January 2009 the Petitioner had made a statement to the said inquiring officer. After the said inquiry, by letter dated 07.10.2010, the 2nd Respondent had issued a charge sheet (P 4) consisting of 10 charges against the Petitioner and had directed the Petitioner to show cause to the said charge sheet within 14 days. The learned ASG further submitted that the disciplinary inquiry under the said charge sheet has already been commenced and it is pending.

When I consider the said circumstances it appears to me that the Petitioner who willingly participated in the said inquiry has remained silent almost two years without coming to courts. He did not question the jurisdiction of the inquiring officer at any stage of the said preliminary inquiry.

The learned ASG submitted that upon the said charge sheet the disciplinary inquiry has already been commenced. The Petitioner in his application to this court has not mentioned the present position of the disciplinary inquiry. But it is

apparent from the letter dated 01.11.2010 (P 5) which had been sent to the 2nd Respondent in reply to the charge sheet by the Petitioner that the said objection namely; the appointment of the inquiring officer is bad in law, has been taken up at the disciplinary inquiry by the Petitioner.

In the case of Sundarkaran Vs. Bharathi and Others (1989) 1 Sri L.R. 45 it was observed that “The court will not be acting in vain in quashing the determination not to issue the licence for 1987 because the right of the Petitioner to be fully and fairly heard in future applications is been recognized.”

Since this question has now been raised at the disciplinary inquiry by the Petitioner by his said letter dated 01.11.2010 and since the said disciplinary inquiry is still pending, I am of the view that the present application of the Petitioner to this court is premature. It is to be noted that certiorari is a discretionary remedy and the court will not issue the writ if it would be futile to do so.

In the said circumstances I see no merit in the Petitioner’s Application. Therefore I refuse to issue a stay order as prayed for in the Petition and I dismiss the Petitioner’s Application for Writ without costs.

Application dismissed.

Judge of the Court of Appeal

SATHYA HETTIGE, PCJ, PCA

I agree.

President of the Court of Appeal